

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6132

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

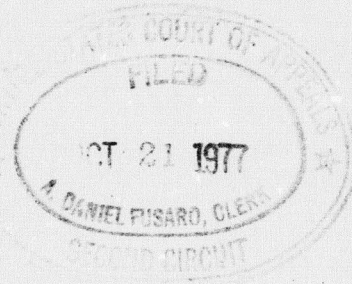
ELEANOR TIMMONS,

Plaintiff-Appellant,

-vs-

JOSEPH P. CALIFANO, in his official
capacity as Secretary of Health,
Education and Welfare,

Defendant-Appellee.



ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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STATEMENT OF ISSUES PRESENTED

The only issue presented for review on this appeal is whether the decision of the appellee Secretary of Health, Education and Welfare denying Social Security disability benefits to the appellant was supported by substantial evidence.

STATEMENT OF THE CASE

Plaintiff commenced this action for review of a decision by the Secretary of Health, Education and Welfare denying her claim for Social Security disability benefits. Specifically, plaintiff alleged that the decision of the Secretary was not supported by substantial evidence. This action was commenced on April 27, 1976 and on July 5, 1977 pursuant to cross motions for summary judgment, a decision and order was entered granting summary judgment to the Secretary. Plaintiff appeals that decision.

Appellant (plaintiff below) has a long tortured history of pain, nervousness, emotional problems, fatigue and adverse reactions to medication. She also suffers from hypoglycemia, osteoarthritis and post-menopausal problems.¹ Such is the inescapable conclusion drawn from the somewhat chronologically confused and often-times illegible medical

¹ Numbers preceded by an "A" refer to pages in the Appendix.

record presented to the Secretary.²

Appellant, born in 1914 is 63 years of age. She completed the tenth grade of school (A-24) and has worked as a clerk and receptionist (A-62). The record discloses no special training or skills. Appellant claims that she has been disabled from employment since December 15, 1969 due to a nervous condition and internal problems (A-72). She was specially insured until September 30, 1970 (A-19).

2

Appellant's presentation was severely handicapped due to the disability and retirement of her treating physician for many years, Dr. Quinlan. (A-180). Consequently, no one was available to decipher the often-times illegible medical records presented in evidence. The author of many of the records is also unclear with the possible choices being either Dr. Quinlan (A-105) or Dr. Heckel (A-153).

As early as 1959, the medical record reveals adverse reactions to drugs and hormones (A-154, 155, 156, 162), and a long-standing anxiety psychoneurosis with varying degrees of reactive depression (A-145). Repeated additional adverse reactions to drugs are documented in the record⁴ leading Dr. Quinlan to declare in 1967:

3

Even in 1956, a Dr. Schuster reported that appellant had a long history of pain since her marriage eighteen years before which was atypical and unresponsive to medication (A-174). He conjectured: "I have serious doubts that anyone can modify the course of [appellant's] illness." He had diagnosed appellant as having a strongly masochistic personality.

4

Reactions to drugs and hormones were recorded on the following dates: 1959 - 1/10(A-168); 2/18 (A-156); 3/10 (A-155); 4/8 (A-154); 5/12 (A-154); 1961 7/5 (A-144); 1965 - 6/8 (A-134); 1967 - 4/1 (A-131); 4/5 (A-137) 5/3 (A-129); 1969 - 1/3 (A-121); 1972 - 3/1 (A-122); 1975 - 1/31 (A-107).

"Personally, I have tried to encourage Mrs. Timmons to get along with as little medication as possible since when she refers to symptoms I have told her that everything that I have tried to give her produced what she called side effects." (A-129.

The record discloses an equally severe history of pain,⁵ psychological problems⁶ and fatigue.⁷ She was diagnosed as having hypoglycemia from her history (A-112) without any alleged date of onset.

Plaintiff has a very low earnings record through 1965 (A-82). Her last work was for two quarters in 1968

⁵ Incidents of pain are recorded: 1956, three times (A-103, 173, 174); 1957 - nine times (A-163, 166, 167); 1959, six times (A-147, 150, 155, 156); 1963, twice (A-103, 138); 1965, twice (A-134, 137); 1966, once (A-137); 1967, twice (A-137, 138); 1968, three times (A-132; 1969, once (A-121); 1973, once (A-122).

⁶ Psychological problems described as depressed and nervous are reported; 1959, nineteen times (A-143, 145, 146, 147, 150, 151, 155, 156, 157, 162); 1961, once (A-143); 1962, once (A-173); 1963, once (A-138); 1964, once (A-133); 1965, twice (A-135, 137); 1966, once (A-137); 1967, twice (A-137, 129); 1969 - three times (A-121, 125, 138); 1973, twice (A-104, 120); 1974, twice (A-104, 111); 1975, three times (A-107, 182-3, 185-5).

⁷ Fatigue is reported: 1956, once (A-173); 1963, once (A-139); 1965, once (A-134); 1967, once (A-129); 1969, once (A-121); 1972, once (A-122); 1973, twice (A-120, 163); 1974, once (A-115).

with an equally low earnings record.

In 1973 Dr. Quinlan in response to a query from the Social Security Administration reported that appellant was disabled. (A-102) and stated:

I am presently treating Eleanor Timmons and have been her treating physician for many years. She experiences constant fatigue; frequent headaches and intense gas and pressure in the intestines. (A-103).

He also stated "patient is depressed at time and crises" (A-103).

In 1974 Dr. Brodows reported appellant was precluded from working during past year and for at least next six months (A-104). Dr. Dvorin reported in 1975 that he had treated appellant since 1974 and that she is disabled by multiple somatic complaints of a functional nature. . . she is totally disabled (A-113). In 1975 Dr. McVeigh wrote:

"It is my opinion that a careful review of Mrs. Timmons record might establish a reasonably strong case for this woman being disabled on the basis of a rather straight-forward emotional inadequacy." (A-184-185).

Dr. Dvorin further explained his position on disability from 1968-1970 in 1975:

...I conclude that she was disabled although it is difficult for me to decide whether this was partial or complete disability ... I speculate that the seriousness of her symptoms may have been downplayed by her physicians Mrs. Timmons' problems may have been underestimated and not properly identified as having major psychogenic factors. (A-182-183).

ARGUMENT

APPELLANT HAS SHOWN THAT SHE WAS UNDER A DISABILITY AND UNABLE TO PERFORM SUBSTANTIAL GAINFUL EMPLOYMENT; THE CONTRARY DECISION BY THE SECRETARY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The sole issue before this court is whether the determination by the Secretary that appellant was not under a disability was supported by substantial evidence. 42 U.S.C. §405(g); Adams v. Weinberger, 521 F.2d 656, 658 (2d Cir. 1975). Accord, Gold v. Secretary of Health, Education and Welfare, 463 F.2d 38, 40 (2d Cir. 1972).

Appellant respectfully urges that this court recognize the failure of the Secretary to introduce substantial evidence in the following respects:

- The Secretary found that pain was not disabling notwithstanding a record replete with occurrences of pain and adverse reactions to medications.
- The Secretary found that psychological problems were not disabling despite a long history of emotional insufficiency and depression.

- The Secretary failed to consider hypoglycemia as contributing to her disability even though it was diagnosed by history.
- Every doctor treating appellant found her disabled and each doctor reviewing the record found that appellant was disabled.
- Appellant's extraordinarily low earnings record demonstrated an inability to perform substantial gainful employment.
- The Secretary failed to consider appellant's constant fatigue

A. The Secretary Found That Pain Was Not
Disabling Notwithstanding a Record
Replete With Occurances of Pain and
Adverse Reactions To Medications.

The medical record in this case is filled with instances of pain suffered by appellant.⁸ Appellant testified hereself that she was "never without pain" (A-66).

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See Footnote "5" supra and the associated text.

The record is equally saturated with reports of adverse reactions to medications of all types,⁹ leading Dr. Quinlan to declare "... everything that I have tried to give her produced what she called side-effects" (A-129). Appellant testified "I keep trying to get the medication and I just get terrible side effects. (A-64, A-66-67).

Notwithstanding this uncontroverted evidence and testimony, the administrative law judge found:

"The claimant's allegations as to the degree of pain experienced are not supported by the weight of the evidence and the claimant's testimony on this point cannot be given full weight. The subjective symptoms are inconsistent with the weight of the medical evidence of record. Some degree of pain is recognized but found not to exceed a mild to moderate degree.... which could be significantly relieved by oral medication." (A-27-28).

This conclusion is without any support in the record and there is clearly no substantial evidence to support it.

B. The Secretary Found That Psychological Problems Were Not Disabling Despite a Long History of Emotional Insufficiency and Depression.

⁹ See Footnote "4" supra and associated text.

Like her constant pain, appellant's history of repeated emotional crisis and severe depressions is well documented in the record.¹⁰ Her treating physician, Dr. Quinlan wrote in 1973 that appellant was depressed at times and crises (A-103). After reviewing the entire medical record in 1975 Dr. McVeigh concluded that:

"A careful review of Mrs. Timmons record might establish a reasonably strong case for this woman being disabled on the basis of a rather straight-forward emotional inadequacy..." (A-184-185).

Appellant's testimony was entirely compatible with the medical evidence. She stated with reference to past surgery and recurrent relapses:

...it affected my nerves and depression. And I was emotionally unstable and I have been and I think that the complications and between neurosis and complications from surgery, it just too much to handle. (A-59).

The Secretary's general finding that the nervous condition was not disabling prior to September 30, 1970 (A- is not supported by substantial evidence.

C. The Secretary Failed to Consider Hypoglycemia As Contributing to Her Disability Even Though It Was Diagnosed By History.

¹⁰

See Footnote "6", supra.

On September 9, 1974 appellant was diagnosed as suffering from hypoglycemia by history and was referred to an endocrinologist (A-111, 112). This diagnosis leads to the conclusion that Appellant was suffering from hypoglycemia long before it was diagnosed, as it was picked up from her medical history.

However the administrative law judge failed to consider this illness as having any role in appellant's disability stating:

...In August, 1974, five years after her alleged onset, hypoglycemia was discovered "...playing some role in her illness... However, the Social Security Act precludes the Social Security Administration from granting disability insurance benefits after the period of specially insured status... terminates (A-27).

It was clearly an error for the administrative law judge to refuse to consider the hypoglycemia as some subsequently discovered ailments are progressive in nature and can lead to an inference that they existed prior to September 30, 1970. Smith v. Weinberger, 394 F. Supp. 1002, 1010 (D.Md. 1975). Cf. Baerga v. Richardson, 500 F.2d 309, 312-13 (3d Cir. 1974). This is particularly true here where the subsequently diagnosed ailment was discovered from the medical history.

D. Every Doctor Treating Appellant
Or Reviewing the Medical Record Found
Her Disabled.

Not one doctor familiar with this case found appellant able to work. In 1973 Dr. Quinlan, the treating physician wrote that appellant was disabled (A-102). Several other doctors, after either reviewing the medical record or reviewing their current file concluded that appellant was disabled.¹¹

Dr. Brodows was the only physician to opine that appellant had been disabled for the past year, she could work after six months, however predicating such a conclusion on speculative successful rehabilitation. (A-104).¹² The following year, 1975 Dr. Dvorin reported that he had treated appellant since 1974 and she was disabled by multiple somatic complaints of a functional nature... "she is totally disabled." (A-107).

¹¹ See Discussion, supra, pp. 8-9.

¹² This report was made in 1974.

There is no support for the Secretary's position that appellant, given her age, 63, education, 10th grade and work experience as a secretary and clerk, could work.

While the Administrative Law Judge was correct in stating that the opinions of the physicians was not controlling (A-28). his mere consideration of the reports of the treating physicians is not sufficient. Oppenheim v. Finch, 495 F.2d 396, 398 (4th Cir. 1974). The "opinion of a claimant's treating physician is entitled to great weight, for it reflects an expert judgment based on a continuing observation of the patient's condition over a prolonged period of time." Vitek v. Finch, 438 F.2d 1157, 1160 (4th Cir. 1971). Accord, Oppenheim v. Finch, supra; Robinson v. Richardson, 340 F.Supp. 243, 248 (E.D.N.Y. 1973).

Appellant testified she stopped working after losing her job because of her illness and pressure on her (A-67). She testified that Dr. Madden told her not to return to work at her last job, but to seek less demanding work (A-67).

The administrative law judge thus improperly limited the weight of the treating physician's unanimous conclusion as to disability.

E. Appellant's Extraordinarily Low
Earnings Records Demonstrated An
Inability To Perform Substantial
Gainful Employment.

It is clear from her earnings record that appellant has not engaged in substantial gainful employment since 1957 (A-82). The medical record during the period since 1957 is remarkable for its multiple occurrences of medical complaints.¹⁴ The administrative law judge did not inquire into this meager earnings record or relate it to appellant's ongoing medical problems.

Despite his obligation to develop the record, the Administrative Law Judge did not develop any facts at the hearing that explained this low earnings record. The plaintiff had testified that she had been told by her doctors many times not to work, but was forced to at times because of the financial situation in her home (A-62, A-64-65). If plaintiff is forced to work to keep the "wolf from the door" in spite of severe and disabling conditions, earnings should be

¹³

Earnings in excess of \$140.00 a month are deemed to indicate an ability to engage in substantial gainful activity. 20 C.F.R. §404. 1534(b) Sporadic activities may indicate an inability, not an ability to engage in substantial gainful activity. Palik v. Mathews, 422 F. Supp. 547 (D. Neb. 1976). Earning \$12.00 or \$25.00 a week does not constitute substantial gainful activity. Hamlet v. Celebrezze, 238 F. Supp 676 (E.D.S.C. 1965). Since 1957, appellant's earnings record show that she rarely earned \$90.00 and more often earned quite a bit less (A-82) a month.

¹⁴

See, Statement of the Case, *supra*, pp. 4-9.

given little weight in determining her ability to engage in substantial gainful activity. Hanes v. Celebrezze, 337 F.2d 200 (4th Cir. 1964). In fact, it is clear from the earnings record that the plaintiff never engaged in "substantial gainful employment".

F. The Secretary Failed to Consider
Appellant's Constant Fatigue.

In addition to her other ailments, appellant suffered multiple episodes of fatigue.¹⁵ In 1973 Dr. Quinlan wrote "...she experiences constant fatigue..." (A-103). Appellant testified she often feels like she is going to pass out or that she is very weak (A-63-64).

The administrative law judge does not discuss this problem in his decision leading to the conclusion that he did not consider it. DePaepe v. Richardson, 464 F.2d 92, 99 (5th Cir. 1972). Accord, Smith v. Weinberger, supra, p. 1007.

¹⁵

See Footnote "7", supra.

In light of these defects in the determination by the Secretary, it should be held that his decision was not supported by substantial evidence.

Substantial evidence has been defined by the Supreme Court as "...more than a mere scintilla. It means reasonable evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427 (1971), quoting from Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938).

A court may not review solely the evidence supporting the Secretary in determining whether substantial evidence exists. The evidence must be viewed in the light furnished by the record in its entirety, including the body of evidence opposed to his view. Dolan v. Celebrezze, 381 F. 2d 231, 233 (2d Cir. 1967).

Though it is not disputed that appellant bears the ultimate burden of persuasion in establishing eligibility for disability benefits, this court has repeatedly held that the standard for eligibility is to be applied "in light of the fact "the Social Security Act is a remedial statute, to be broadly construed and liberally applied."" Gold v. Secretary of Health, Education and

Welfare, supra, at 41 quoting from Haberman v. Finch 418 F.2d 664, 667 (2d Cir. 1969).

This Court has likewise held that congressional policy underlying the Social Security Act requires the Court to interpret the Act liberally to resolve any doubts in favor of coverage, Herbst v. Finch, 473 F.2d 771, 775 (2d Cir. 1972), and not to construe the Act in "niggardly fashion" to deny coverage. Steele v. Richardson, 472 F.2d 49 (2d Cir. 1972). Accord, Damon v. Secretary of Health, Education and Welfare, 557 F.2d 31, 33 (2d Cir. 1977).

This Court has recognized that while hearings on social security disability claims are not adversary proceedings, where the disability benefits claimant is unrepresented by counsel, as was the case here, the administrative law judge has a duty to scrupulously and conscientiously probe into, inquire of and explore for all relevant facts. Cutler v. Weinberger, 516 F.2d 1282, 1286 (2d Cir. 1975). The lack of legal representation can, in part, also heighten the duty of the reviewing court to make a "searching investigation" of the record. Gold, supra, at 43, citing Miracle v. Celebrezze, 351 F.2d 361, 382-282 (6th Cir. 1965).

This court has also recognized that where medical records such as those here, are illegible, the claimant is entitled to special consideration. Cutler v. Weinberger, supra at 1286, as a "physical or mental impairment does not cease to exist merely because it is difficult of proof [cit. omitted]. Cutler, at 1287.

In order to qualify for disability payments under the Social Security Act, the wage earner must show disability on or prior to the last date he was insured under the act. 42 U.S.C. §§416(1), 423(c); Gold, supra, pp 40-41.¹⁶ Therefore, appellant must have proved prior to that date she was "unable to engage in any substantial gainful activity by reason of any medically determinable mental or physical impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §423(d).

Four elements of proof must be considered in determining the ability of the appellant to work:

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At the time of the hearing, the plaintiff was specially insured until September 30, 1970 so she could have proved a disability through that time.

1. objective medical facts and clinical findings;
2. diagnoses and medical opinions of examining physicians;
3. subjective evidence of pain and disability as testified to by plaintiff and corroborated by others who have observed him;
4. the age, educational background and work history of plaintiff.

All of these elements of proof must be considered together and combination with each other, in order to consider the interaction and cumulative effects of each ailment Gold, supra, at 41.

In light of the unequivocal medical evidence presented and the testimony of appellant it is unclear how the administrative law judge could have considered the cumulative effects of each ailment and then found appellant was able to work.

Once the appellant demonstrated her inability to perform her customary occupation, the burden of proof shifted to the Secretary to show that appellant, given her age, education and work experience, had the capacity to perform a specific job that exists in the national economy. Wyatt v. Weinberger, 519 F.2d 1285, 1287 (4th Cir. 1975). Accord, Hernandez v. Weinberger, 493 F. 2d 1120, 1123 (1st Cir. 1974); Terio v. Weinberger, 410 F. Supp. 209, 213 (W.D.N.Y. 1976);

Robinson v. Richardson, supra, at 248.

If there are no findings to the latter, the Secretary's decision will be sustained only if there is substantial evidence that the plaintiff's impairment does not prevent her from engaging in her previous customary occupation. Smith v. Weinberger, supra at 1006. The Secretary did not pinpoint a specific job in the instant case. He said merely she could return to her previous employment (A-10) a possibility appellant testified Dr. Madden had ruled out. (A-67).

The Secretary's decision that appellant was not disabled was unsupported by substantial evidence.

CONCLUSION

For the foregoing reasons, the judgment of the District Court granting summary judgment to the appellee-defendant should be vacated and reversed, and summary judgment should be granted to appellant.

DATED: October 13, 1977
Rochester, New York

Respectfully submitted,

Monroe County Legal Assistance Corp.
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Attorneys for Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELEANOR TIMMONS,

Plaintiff-Appellant,

-vs-

AFFIDAVIT OF
SERVICE

77-6132

JOSEPH P. CALIFANO, in his Official
Capacity as Secretary of Health,
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Defendant-Appellee.

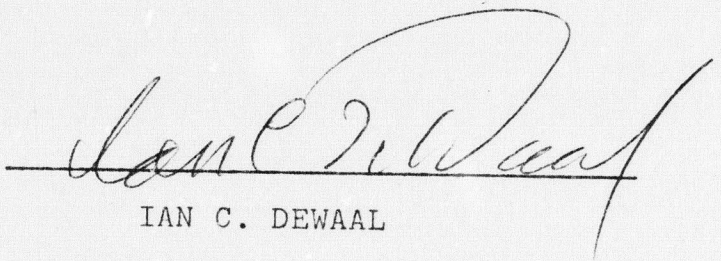
STATE OF NEW YORK)
COUNTY OF MONROE) ss.:
CITY OF ROCHESTER)

Ian C. DeWaal, being duly sworn, deposes and says:

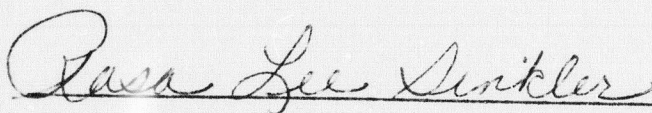
1. He is over eighteen years of age, is not a party to this action, and resides at 900 Monroe Avenue, Rochester, New York.

2. On the 20th day of October, 1977 he served upon Eugene Welch, Assistant U.S. Attorney, attorney for defendant-appellee: two copies of Appellant's Brief on Appeal; one copy of the Appendix on Appeal; and one copy of the Notice of Appearance, by enclosing same in a post paid wrapper addressed to 233 U.S. Courthouse, Rochester, New York, 14614, the

address designated by said attorney for that purpose and depositing same in an official depository under the exclusive custody and care of the United States Postal Service.


IAN C. DEWAAL

Sworn to before me, this
20th day of October, 1977.



ROSA LEE SINKLER
NOTARY PUBLIC, State of N. Y. Monroe County
My Commission Expires March 30, 1978

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

- ☐ Certification By Attorney
☐ Attorney's Affirmation

certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.
shows: deponent is

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.
Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

Check Applicable Box

- ☐ Individual Verification
☐ Corporate Verification

the foregoing the being duly sworn, deposes and says: deponent is in the within action; deponent has read and knows the contents thereof; the same is true to those matters deponent believes it to be true.
the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action,

☐

Affidavit of Service By Mail

On

19

deponent served the within

upon

in this action, at

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Check Applicable Box

☐

Affidavit of Personal Service

On

19

at

deponent served the within

upon

herein, by delivering a true copy thereof to h person so served to be the person mentioned and described in said papers as the

the personally. Deponent knew the therein.

Sworn to before me on

19

The name signed must be printed beneath

NOTICE OF ENTRY

Sir-Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,

MONROE COUNTY LEGAL ASSISTANCE CORP.

Attorney for

Office and Post Office Address
80 West Main Street
ROCHESTER, NEW YORK 14614

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on

19

at

M.

Dated,

Yours, etc.,

MONROE COUNTY LEGAL ASSISTANCE CORP.

Attorney for

Office and Post Office Address
80 West Main Street
ROCHESTER, NEW YORK 14614

To

Attorney(s) for

Index No.

Year 19

**UNITED STATES COURT OF APPEALS
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Defendant-Appellee.

ORIGINAL

AFFIDAVIT OF SERVICE

**IAN C. DEWAAL, ESQ.
MONROE COUNTY LEGAL ASSISTANCE CORP.**

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(716) 325-2520**

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

